STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

(Cavanagh, P.J., and Owens and M.J. Kelly, JJ.)

JEFFREY CULLUM,

Plaintiff-Appellee,

v

FREDERICK LOPATIN, D.O.,

Defendant-Appellant,

and

DEARBORN EAR, NOSE AND THROAT CLINIC, P.C.,

Defendant.

SC No. 149955
COA No. 313739
LC No. 10-007013-NH
(Wayne County Circuit Court)

REPLY BRIEF IN SUPPORT OF FREDERICK L. LOPATIN, D.O.'S APPLICATION FOR LEAVE TO APPEAL

149955 reply

PROOF OF SERVICE

GIARMARCO, MULLINS & HORTON, P.C.

By: Donald K. Warwick (P44619)
Attorney for Defendant-Appellant
Frederick L. Lopatin, D.O.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, MI 48084-5280
(248) 457-7072

PLUNKETT COONEY

By: Robert G. Kamenec (P35283)
Attorney of Counsel for
Defendant-Appellant
Frederick L. Lopatin, D.O.
38505 Woodward Ave, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4068

and

BUTZEL LONG, PC

By: Louis Theros (P42970)
Attorney for Defendant-Appellant
Frederick L. Lopatin, D.O.
150 West Jefferson Avenue, Suite 100
Detroit, MI 48226
(313) 225-7039

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STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND INDICATING THE RELIEF SOUGHT

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsection in his Application for Leave to Appeal dated August 21, 2014, page ix.

STATEMENT OF QUESTIONS PRESENTED

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsection in his Application for Leave to Appeal dated August 21, 2014, page x.

INTRODUCTION

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsection in his Application for Leave to Appeal dated August 21, 2014, pages 1-3.

STATEMENT OF FACTS

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsection in his Application for Leave to Appeal dated August 21, 2014, pages 3-16.

THE NEED FOR SUPREME COURT REVIEW

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsection in his Application for Leave to Appeal dated August 21, 2014, pages 17-22.

Plaintiff admits that issues regarding reliability frequently occur in the Court of Appeals and the trial courts, but contends that this Court would have "little time for its other business" if it granted leave to appeal in every matter involving a disputed reliability challenge (Plaintiff-Appellee's Brief, page 19). This analysis begs the question because, as already demonstrated in Defendant's Application, there are many instances in Michigan law where the trial court and the Michigan Court of Appeals incorrectly interpret and/or apply the reliability standards of MRE 702 and MCL 600.2955. Moreover, Plaintiff does not substantively respond to one of the reoccurring problems in this area, namely the incorrect use of "*ipse dixit*" causation opinions of expert witnesses, placed on full display in this case. See *Joiner v General Electric Co*, 522 US 136, 146 (1997). The Court need go no farther than the statement made by Plaintiff at page 20 of the Brief, that Dr. McKee specifically correlated the onset of symptoms with the administration of steroids and referred to a

"classic" presentation - a presentation he himself declared. Finally, Plaintiff fails altogether to respond to the need for review here of well-established doctrine that speculative expert testimony cannot be presented to the jury. See generally *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994).

STANDARD OF REVIEW AND SUPPORTING AUTHORITY

Defendant-Appellant Frederick Lopatin, D.O. refers this Court to the corresponding subsections in Argument I, page 23, and Argument II, page 42, of his Application for Leave to Appeal.

ARGUMENT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN FINDING DR. MCKEE'S CAUSATION OPINION UNRELIABLE AND UNSUPPORTED UNDER MRE 702.

At pages 20-21 of his Brief, Plaintiff contends that the Court of Appeals correctly reversed for the trial court's failure to specifically apply the standards of MCL 600.2955. In so arguing, Plaintiff forgets that in the lower court, Plaintiff sought to have those factors applied to articles and exhibits which were not relied upon by Dr. McKee in his video trial deposition. (See generally Defendant's Application, pages 37-39). Stating that section 2955 factors must be applied to information that was not relied upon by the expert in his trial deposition is placing the proverbial cart before the horse.

In addition, Defendant has demonstrated that the opinion of Dr. McKee was not reliably applied to the circumstances of the case, regardless of the application of the section

2955 factors. See *In re Paoli RR PCB Litig*, 35 F3d 717, 745 (CA 3, 1994) (any step that renders an analysis unreliable in turn renders the expert's testimony inadmissible).

At pages 22-32 of his Brief, Plaintiff argues that this is not a case about novel scientific methodology or junk science, but rather of sound medical methodology used by physicians from "time immemorial" (page 22). Plaintiff then seeks to circumstantially establish the reliability of Dr. McKee's opinion on the thin reed that: (1) there is a correlation between corticosteroids and avascular necrosis ("AVN"); (2) "differential diagnosis" (eliminating other causes of a condition)[1] is a specific methodology upon which reliability can be determined; (3) "large-population controlled studies or their equivalents" are not required to establish reliability of Dr. McKee's opinion; (4) Dr. McKee had treated "numerous patients who presented exactly as did Plaintiff" and thus his clinical experience is both relevant and sufficient; (5) the fact that opinions are "controversial" does not render them per se unreliable.

Starting in reverse order, this last point is incorrect. By its very definition, "controversial" means "turned opposite" or "an expression of opposing views." Webster's Ninth New Collegiate Dictionary, p 285 (1983). Where there are "opposite" views on a particular subject in the scientific community, it is incumbent upon the proponent of the testimony to present independent, scientifically reliable information to support his or her view. The fact that an opinion is "controversial" in the scientific community may not always eliminate a finding of reliability, but does so when the controversy is created by the

[1] In fact, Plaintiff specifically discusses Dr. McKee's testimony about "what he had done to rule out *other causes*" (emphasis supplied) (Plaintiff's Brief, pp 26-28).

personal experiences and opinion of the expert, as opposed to scientific and peer-reviewed literature that may show some degree of objective disagreement on the topic.

Plaintiff relies heavily upon the Sixth Circuit case of *Best v Lowe's Home Centers, Inc*, 563 F3d 171 (CA 6, 2009), and contends that Dr. McKee used "differential diagnosis" as a specific and recognized methodology of linking Plaintiff's alleged AVN to short-term steroid exposure. In *Best*, the plaintiff was reaching for pool chemicals when a slit in the bag allowed the chemicals to pour directly upon the plaintiff. There was a clear-cut case of exposure. In the course of its opinion, the Sixth Circuit found that the use of "differential diagnosis" prompts the following three questions:

1. Did the expert make an accurate diagnosis of the nature of the disease?

2. Did the expert reliably rule in the possible causes of it?

3. Did the expert reliably rule out the rejected causes?

If the Court were to answer "no" to any of these questions, the Court must exclude the ultimate conclusion reached. *Best*, 563 F3d at 179; *Tamraz v Lincoln Electric Co*, 620 F3d 665, 674 (CA 6, 2010).

In *Best*, unlike the present case, the temporal relationship between the Plaintiff's exposure to the chemical and the onset of his symptoms, in conjunction with a principled effort to eliminate other possible causes of the condition, were sufficient for the expert to form the opinion that the inhalation of the pool chemicals causes the plaintiff to lose his sense of smell. *Best*, 563 F3d at 176.

Here, it is undisputed that Plaintiff had chronically abused alcohol and smoked cigarettes for many years (**Exhibit D**, pp 12, 25-26, 31, 44). Dr. McKee agreed that it is possible that a person who drank as much alcohol as Plaintiff would develop AVN (**Exhibit**

E, p 70) and conceded that Dr. Mayo, as the treating orthopedic surgeon, would certainly be in a better position to have analyzed Plaintiff in terms of potential causes and etiology of his symptoms (**Exhibit I**, p 34). The record reveals that Dr. Mayo's opinion was that Plaintiff was drinking a lot of alcohol, which increased his risk of AVN, and that ultimately alcohol was the cause of Plaintiff's AVN (**Exhibit H**, p 20). To that opinion, Dr. Mayo testified that there was probably not a significant additive effect if alcohol is consumed with steroids (*Id.*, p 89). Add to this that Dr. McKee's own "research letter" recognizes that it is open to criticism because there may be unknown causes, or other causes, of AVN following corticosteroid therapy, which include alcohol (**Exhibit F**; **Exhibit E**, pp 92-93).

Plaintiff's invocation of differential diagnosis is especially meritless when the Court recalls that, at his first deposition, Dr. McKee was not even aware – until he was shown – that Plaintiff's treating orthopedic surgeon, Dr. Mayo, had noted a significant alcohol history (**Exhibit E**, p 13). And unlike Dr. Hood, who was aware that Plaintiff had received a shot of steroids from a family physician shortly before being diagnosed with AVN, Dr. McKee did not recall the shot in the medical record, and opined that whether the shot was a precipitating factor would "depend" on the route and amount of medication administered (**Exhibit D**, p 50; **Exhibit E**, pp 24-25).

The failure to account for this foundational information dooms Plaintiff's attempt to rely on "differential diagnosis" as a reliable methodology here to support Dr. McKee's position. Indeed, a differential diagnosis seeks to identify the disease causing a patient's symptoms by "ruling in all possible diseases and ruling out alternative diseases until (if all goes well) one arrives as the most likely cause." *Tamraz*, 620 F3d at 674. Dr. McKee hardly failed to account for the "rule in" causes, let alone exclude reliably the rejected causes.

Under such facts, "simply claiming that an expert uses the 'differential diagnosis' method is not some incantation that opens the *Daubert* gate." *Tamraz*, 620 F3d at 674, quoting with approval *Bowers v Norfolk S Corp*, 537 F Supp 2d 1343, 1361 (MD Ga, 2007).

Finally, Plaintiff sets up and then knocks down several straw man arguments. Reliability is not limited to "novel scientific methodology" but is required under MRE 702 and MCL 600.2955 as a predicate item of an expert's opinion, especially a causation opinion. Dr. Lopatin has not argued that there need be a "double-blind, placebo controlled study" to establish reliability in this case. On the contrary, throughout his Application for Leave to Appeal, Dr. Lopatin has shown the deficiencies in Dr. McKee's testimony, ranging from the heavy weight that he places in his own opinion and clinical experience, to the limited and misplaced similarity between his study and the case at bar, and his failure to account for other causes of AVN. Plaintiff's histrionics in response do not substitute for fact-based testimony supported by peer-reviewed literature which takes into account other possible causes of AVN, and then reliably eliminates them (if Plaintiff insists on using a "differential diagnosis" approach).

For all these reasons, this Court should reverse and remand for entry of summary disposition in favor of Dr. Lopatin.

ARGUMENT II

THE TRIAL COURT CORRECTLY GRANTED SUMMARY DISPOSITION WHERE THE ONLY ADMISSIBLE EVIDENCE SUBMITTED BY PLAINTIFF ON CAUSATION WAS SPECULATIVE AND THE AVASCULAR NECROSIS WAS LEGALLY UNFORESEEABLE IN THESE CIRCUMSTANCES.

At pages 34-37 of his Brief, Plaintiff contends that the foreseeability analysis provided by the defense lacks merit because it was presented by defense trial counsel, interpreting the relevant information, rather than expressly from an expert witness, and therefore should be disregarded. Notably, not a single case is cited by Plaintiff for this proposition, or for that matter, for any point found in response to Defendant's second argument on appeal. A party may not leave it to this Court to search for authority to sustain or reject its position. *Magee v Magee,* 218 Mich App 158, 161; 553 NW2d 563 (1996). Nor may a party merely announce its position and leave it to this Court to discover and rationalize the basis for the claim. *Goolsby v Detroit,* 419 Mich 651, 655 n1; 358 NW2d 856 (1984).[2]

Plaintiff otherwise misunderstands Defendant's primary argument. Given the unaccounted-for causation variables, such as the Plaintiff's use of excessive alcohol, receiving an injection of steroids from a family physician shortly before being diagnosed with AVN, and the like, it would be speculative in these circumstances to say that the short-

[2] Plaintiff announces that if Plaintiff is going to be required not only to use expert testimony, but "to run any opinions so obtained through the *Daubert* gauntlet," so too must the defense. This is a curious argument because, it is the plaintiff that has the burden of demonstrating the reliable basis for the expert opinion. See generally *Craig v Oakwood Hospital,* 471 Mich 67; 684 NW2d 296 (2004). Moreover, when seeking summary disposition, the law does not require the defense to prove anything. *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).

term exposure caused the AVN. Just as Dr. Hood could not state with a reasonable degree of medical probability that the administration of steroids was the cause of Plaintiff's AVN (as opposed to Plaintiff's excessive alcohol consumption) (**Exhibit D**, p 11), so too Dr. McKee's *opinion* that the causal link between short-course steroid therapy and AVN lacks the requisite certainty to be presented to the jury under *Skinner, supra* (an expert must "exclude other reasonable hypotheses with a fair amount of certainty"). *Skinner*, 445 Mich at 166-167.

For all these reasons, this Court should reverse and remand for reinstatement of summary disposition in favor of Dr. Lopatin.

CONCLUSION AND RELIEF REQUESTED

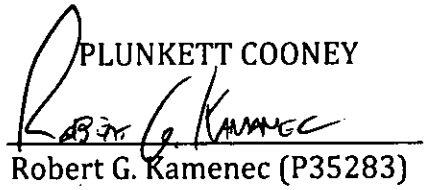
WHEREFORE, Defendant-Appellant Frederick L. Lopatin, D.O. requests this Court issue an order which peremptorily reverses the Court of Appeals July 10, 2014 Opinion, and reinstate the trial court's grant of summary disposition. In the first alternative, Defendant requests this Court grant leave to appeal, consider this case on a calendar basis, and issue the same relief. In the second alternative, Defendant requests this Court allow oral argument on this Application, and then issue the same relief. Defendant also requests the recovery of all costs and attorney fees so wrongfully sustained on appeal.

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By: Donald K. Warwick (P44619)
Attorney for Defendant-Appellant
Frederick L. Lopatin, D.O.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, MI 48084-5280
(248) 457-7072

PLUNKETT COONEY

By: 
Robert G. Kamenec (P35283)
Attorney of Counsel for
Defendant-Appellant
Frederick L. Lopatin, D.O.
38505 Woodward Ave, Suite 2000
Bloomfield Hills, MI 48304
(248) 901-4068

and

BUTZEL LONG, PC

By: Louis Theros (P42970)
Attorney for Defendant-Appellant
Frederick L. Lopatin, D.O.
150 West Jefferson Avenue, Suite 100
Detroit, MI 48226
(313) 225-7039

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